



July 31, 2009

Clerk  
Michigan Supreme Court  
P.O. Box 30052  
Lansing, MI 48909

RE: ADM File No. 2009-04

Dear Clerk:

These comments are relating to the matter of “Proposals Regarding Procedure for Disqualification of Supreme Court Justices,” as referenced above.

I am writing on behalf of the Center for Competitive Politics (CCP), a non-profit organization with a focus on campaign finance regulations and election law. CCP’s mission is to educate the public on the actual effects of money in politics, and the positive results of a more free and competitive electoral process.

In the wake of the Supreme Court’s *Caperton* decision, many states are re-evaluating their judicial recusal standards. As an amicus in support of the respondents in *Caperton*, CCP wholeheartedly disagreed with the ruling of the Court. These comments echo several of the main arguments that appeared in that brief, and also address the proposed alternatives.<sup>1</sup>

It is important to keep in mind that the Supreme Court has repeatedly ruled that spending money independently to advocate the election or defeat of a candidate is a core right protected by the First Amendment, and thus any effort to limit or prevent citizens from doing so is highly unlikely to pass constitutional muster.

Similarly, the decision in *Caperton* was based on what the court believed to be the extraordinary and unique factors of the case, most notably that the appeal would occur at the same time the litigant began his spending campaign to elect another judge. Thus, in crafting any recusal standards that take independent political speech into account, Michigan must keep the First Amendment rights of citizens in sight and not seek to set recusal standards that might dissuade citizens from engaging in independent speech that is less extraordinary and unique than that at issue in the *Caperton* case.

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<sup>1</sup> See Brief of Amicus Curiae Center for Competitive Politics in Support of Respondents, *Caperton v. A.T. Massey Coal Co., Inc.*, 08-22 (Feb. 4, 2009).

With regard to the three alternatives, we would favor Alternative B solely because it contains the following provision (under §B(2)): “Statements or conduct by anyone other than the justice shall not be considered in assessing the impartiality of a justice, nor shall campaign speech protected by *Republican Party of Minnesota v. White* 536 US 765; 122 S Ct 2528; 153 L Ed 2d 694 (2002), be a proper basis for the disqualification of a judge.”

Any adopted rule that does not include this provision runs the very real risk of over-running the First Amendment rights of citizens in Michigan to speak out about the candidates they support. It is essential in any revision of these rules to consider the distinct difference between direct contributions to candidates and independent expenditures by citizens because they greatly affect the standards for measuring a probability of or an appearance of bias.

Direct campaign contributions to any candidate from individuals are disclosed and that information is easily available to any interested parties and the general public. Independent expenditures, however, which were at the root of the *Caperton* case, are made in support of or opposition to a candidate by an independent individual or group and not affiliated with any candidate in any way. Not only is there no risk of corrupting influence in that instance, but attempts to equate direct contributions with independent expenditures run counter to longstanding Supreme Court precedent. Indeed, it is worth noting that the *Caperton* opinion itself did not characterize the \$3 million spent by Massey’s chief executive as “expenditures.” The court, instead, called the spending “contributions.” Campaign finance experts are not debating the significance of the court’s language choice, and the choice could serve to better protect independent expenditures in judicial campaigns in the future.<sup>2</sup>

Most importantly, of the three alternatives, Alternative B is the only one to specifically state that a motion for disqualification cannot be based on campaign speech, other than by the candidate. This language should be included in any rule adopted by the Court.

Alternative B, however, also states that the list of grounds for disqualification is exclusive. That presupposes an exhaustive list of all circumstances under which it may be appropriate for a judge to withdraw from serving on a case, which is extremely unlikely and also unnecessary. The current rule in Michigan provides that the grounds listed for disqualification are not exclusive, and there is no reason to modify that rule at this stage and create a situation down the road that may very clearly impinge on the due process clause of a petitioner.

The interest of the Court in maintaining a positive public opinion of the judiciary and upholding the Court’s institutional legitimacy is an understandable and important one. However, research conducted after the *Caperton* decision which focused on the opinion of West Virginia residents on the state Supreme Court under various scenarios mirroring the *Caperton* case suggested that

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<sup>2</sup> Bauer, Bob. “Kennedy’s Problem in *Caperton v. Massey* and the Unfortunate Solution He Chose,” More Soft Money Hard Law Web Updates, posted June 12, 2009, available at [http://www.moresoftmoneyhardlaw.com/updates/the\\_supreme\\_court.html?AID=1453](http://www.moresoftmoneyhardlaw.com/updates/the_supreme_court.html?AID=1453)

“several of the assumptions of the majority in the recently decided *Caperton v. Massey* are empirically inaccurate, at least from the viewpoint of the citizens of West Virginia.”<sup>3</sup>

Specifically, the report finds that under various scenarios – including direct contributions, independent expenditures, a judge refusing a contribution, and whether a judge disqualified themselves under those scenarios – that “citizens seem to be making inferences about whether the judge is actually capable of making a principled decision or not. Contributions, ipso facto, do not necessarily undermine the integrity of the judiciary.”<sup>4</sup>

In short, the study finds that public opinion of the judiciary has little to do with recusal standards, and by extension, even less to do with any campaign finance regulations that may be embedded in those standards. In recognizing that the broad issue before the court is indeed disqualification standards in order to ensure the integrity of the judiciary, it is our hope that lawful campaign expenditures and political First Amendment rights will not be the casualty.

Reacting too strongly to the *Caperton* decision by imposing exclusive and strict guidelines on elected officials will likely have negative repercussions in the future. Regulating theoretical actions versus implementing new, stringent rules on actual campaigns and real life cases will prove extremely difficult. It will lead to calls for increasingly detailed rules that will undermine not only the rights of citizens, but also the integrity of the Court in the assumption that elected judges are no longer fit to police themselves.

The Center for Competitive Politics would be happy to provide additional commentary or research as preparations are made for the upcoming public hearings on this issue.

Sincerely,



Laura Renz  
Research Director

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<sup>3</sup> Gibson, James L. and Gregory A. Caldiera. “Campaign Support, Conflicts of Interest, and Judicial Impartiality: Can the Legitimacy of Courts Be Rescued by Recusals?” Presented at the Chicago Area Political and Social Behavior Workshop, May 8, 2009, Northwestern University.

<sup>4</sup> Ibid at page 30